APPENDIX—AMENDED VERIFIED PETITION
(exhibits omitted)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

Index No. 5174/90

APPLICATION OF RYE PSYCHIATRIC HOSPITAL CENTER, INC.,

Petitioner,

For a Judgment Pursuant to ARTICLE 78 of the CPLR,

—against—

RICHARD C. SURLES, Ph.D., Commissioner of the Office of Mental Health of The State of New York, and GREGORY KALADJIAN, Acting Commissioner of The State of New York, Department of Social Services,

Respondents.

AMENDED VERIFIED PETITION

Petitioner Rye Psychiatric Hospital Center, Inc. ("Rye") alleges:

1. Rye is a corporation duly organized and existing under the laws of the State of New York with its principal place of business located at 754 Boston Post Road, Rye, New York.

2. Rye owns and operates an investor-owned private free standing psychiatric hospital located at 754 Boston Post Road, Rye, New York.

3. At all material times Rye's patients have included individuals whose medical treatment is the financial responsibility of the State of New York under the Medicaid program. (Such individuals are hereinafter referred to as "Medicaid patients").

4. Under the provisions of Social Services Law § 367 and other applicable law, Rye's costs of care of Medicaid patients are a charge against, and a contractual responsibility of, the state.

5. The Medicaid program is jointly funded by the federal government and the State of New York.

6. Respondent Richard C. Surles, PhD., is the Commissioner of the New York State Office of Mental Health ("OMH") and is empowered, pursuant to § 31.04 of the Mental Hygiene Law, to promulgate regulations affecting psychiatric hospitals in New York. He is also responsible for the preparation of a state plan for medical assistance to recipients under Title XIX of the Social Security Act (42 U.S.C. § 1369a, *et seq.*), which governs the Medicaid program. In addition, Commissioner Surles is responsible for determining the rate at which Rye will be paid by the State of New York for its costs of care of Medicaid patients. All of the actions attributed to OMH herein are the responsibility of Commissioner Surles.

7. Respondent Gregory Kaladjian is the Acting Commissioner of the Department of Social Services of the State of New York ("DSS") (successor to Cesar A. Perales who was the Commissioner at the times relevant hereto), which is the designated single state agency for medical assistance, and is responsible, among other things, for making the assurances and findings required under 42 CFR § 447.253 *et seq.*, to the U.S. Department of Health and Human Services ("HHS") with respect to a state plan establishing rates of payment to psychiatric hospitals in New York State for their costs of care of Medicaid patients.

8. Under 42 U.S.C. § 1396a(a)(13)(A), a state plan under the Medicaid program must provide for payment to health care providers such as Rye "through the use of rates . . . which the state [through Commissioner Kaladjian] finds, and makes assurances satisfactory to the Secretary [of HHS], are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable state and federal laws, regulations and quality and safety standards and to assure that individuals eligible for medical assistance have reasonable access (taking into account geographic location and reasonable travel time) to in-patient hospital services of adequate quality . . . ." In addition, the state's rates must "take into account the situation of hospitals which serve a disproportionate number of low income patients with special needs . . ." (the "Boren Amendment") The foregoing requirements are also embodied in 42 CFR § 447.253.

9. On April 30, 1990, Rye received an undated letter from OMH that enclosed a copy of "the Final Medicaid in-patient rate computation schedule for [Rye] for the rate year beginning January 1, 1986 through December 31, 1986." (A copy of that letter and the enclosed rate computation schedule are annexed hereto as Exhibit A). The 1986 Final Medicaid Reimbursement Rate established in that letter was $226.55 per patient per day.

10. The regulation incorporating the "minimum utilization factor" was promulgated by Commissioner Surles (or his predecessor), and Commissioner Perales purported to find it to be in compliance with applicable federal law and regulations, and made assurances but no findings to that effect to HHS. That rate was established unlawfully by OMH through the introduction of a "minimum utilization factor" into its Medicaid rate computation methodology. (*See* 14 NYCRR § 577.7(g)). On July 2, 1991, United States District Judge Gerard L. Goettel found the regulation to be null and void as

violating the Boren Amendment to the Social Security Act 42 U.S.C. § 1396a(a)(13)(A). 768 F Supp. 82 (S.D.N.Y. 1991). Respondents took no appeal from the judgment entered on this opinion and are bound thereby.

11. The "minimum utilization factor" had been applicable only to private psychiatric hospitals and not to any other type of hospital, including general hospitals with psychiatric divisions.

12. Essentially, the "minimum utilization factor" provided that if a private psychiatric hospital did not achieve an overall occupancy rate equal to 75% of its certified bed capacity in the "base" year (two years before the rate year) which OMH used as a starting point for determining the hospital's allowable costs, a fictitious number of "patient days" would be imputed to the hospital in the base year to artificially achieve a 75% occupancy rate. Thus, when the total Medicaid allowable costs of such a private psychiatric hospital was computed by dividing its allowable costs by the fictitious number of "patient days", a rate would be established for its Medicaid reimbursement.

13. In Rye's case, its actual occupancy rate was below 75% in both the base year (1984) and the rate year (1986) due directly to its ability to efficiently treat and release patients earlier than comparable hospitals. However, as a result of OMH's imputation of a number of fictitious patient days to Rye, OMH unlawfully reduced Rye's Medicaid payment rate for 1986 and subsequent years.

14. Rye's actual number of patient days in 1986 was 8,449; the number fictitiously imputed by OMH is 11,255. By thus artificially increasing the number of patient days by which Rye's allowable costs would be divided in arriving at Rye's 1986 Medicaid rate, OMH unlawfully reduced the amount otherwise payable to Rye per Medicaid patient per day from $282.46 to $226.55.

15. As a result of OMH's unlawful reduction of Rye's 1986 Medicaid rate through the use of the "minimum utilization factor", Rye has been underpaid $110,925.44 for its costs of care of Medicaid patients for the year 1986.

16. In addition, in 1986, and in each year since then to the present, Rye has treated a disproportionate share of low income patients with special needs as that term is used in 42 U.S.C. §§ 1396r-4(c) and 1395ww(d)(5)(F)(iv)(II), Rye is entitled to an additional five percent (5%) of its 1986 proper Medicaid reimbursement of $564,825 or $28,241. Since in 1986 Rye received $449,475, a total of $143,591 has been underpaid for that year.

17. Pursuant to 14 N.Y.C.R.R. § 577.7(d) each year, OMH established "provisional" rates (based upon two-year-old cost reports submitted by Rye) which it paid Rye's private hospital Medicaid reimbursement subject to an audit, after which the rates become final. The last year for which Rye has received such a "final" rate is 1986 (See Exhibit A). OMH had not informed Rye of a new "provisional" rate for (1991) until January 23, 1992.

18. In calculating "provisional" rates for 1987 through July 2, 1991, OMH applied the minimum utilization factor, in each year substantially reducing the amount of Rye's Medicaid reimbursement. Following, are the amounts of Medicaid reimbursements payable to Rye from 1987 to the present without the minimum utilization factor, the amounts actually paid, and the difference to which Rye is entitled, including disproportionate share adjustment ("DPS"):

	Correct Amount Before DPS	DPS Adjustment	Amount Paid	Amount Underpaid and Due To Rye
1987	$564,814	$28,241	$423,760	$169,295
1988	655,105	32,755	468,860	219,000
1989	559,710	27,986	399,624	188,072
1990	926,764	46,338	625,289	347,813

Correct Amount Before DPS	DPS Adjustment	Amount Paid	Amount Underpaid and Due To Rye
1991 (to 7/2)			
1,106,616	55,331	746,635	415,312
1991 (7/2-12/31)			
1,196,728	59,836	1,196,728	59,836
1992 (to 1/23)			
117,644	5,882	117,644	5,882
		Total	$1,405,210

19. Rye requested that Judge Goettel order respondents to complete audits that would make the rates for prior years final (14 N.Y.C.R.R. § 577.7(d)) and do so without application of the minimum utilization factor. Rye further requested that upon completion of such audits respondents be ordered to pay Rye the amount unlawfully withheld for the years 1986 to the present including the disproportionate share adjustment.

20. In an Opinion and Order dated November 7, 1991 Judge Goettel found that the Eleventh Amendment precluded a federal court from affording Rye any relief prior to its July 2, 1991 order, but any relief after that date would be prospective and not subject to the Eleventh Amendment bar. Specifically, respondents were ordered to comply fully with the applicable federal law and the July 2 order, and to recalculate Rye's rates as a disproportionate share hospital after July 2, 1991. A copy of the November 7, 1991 order is annexed hereto as Exhibit B.

21. Commencing as of July 2, 1991, respondents have failed and refused to add the five percent (5%) disproportionate share adjustment to which Rye is entitled by federal law although demand therefore has been made.

22. Furthermore, OMH has failed and refused to pay to Rye the difference between the amounts paid for 1987 through July 2, 1991 and the amount to which Rye is entitled, includ-

ing past and current disproportionate share adjustments, in the amount of $1,363,067, despite due demand therefore.

23. Respondents have taken the position in the federal court action that audits of Rye's cost reports, upon which the reimbursement rates for 1987 through July 2, 1991 are based, cannot be required and that there is no intention to audit them. Accordingly, Rye's reimbursement rates, without use of a minimum utilization factor, for those years are now final, and respondents are estopped from asserting otherwise.

24. Respondents' refusal to recalculate Rye's Medicaid reimbursement rates or to determine Rye's status as a disproportionate share hospital for the period January 1, 1986 to the present without use of the minimum utilization adjustment constitutes a failure to perform a duty enjoined upon them by 42 U.S.C. § 1396a(a)(13)(A) and is arbitrary and capricious.

25. Respondents' refusal to recalculate Rye's Medicaid reimbursement rates for the period January 1, 1986 to July 2, 1986, or to determine Rye's status as a disproportionate share hospital for the period January 1, 1986 to the present without use of the minimum utilization adjustment constitutes a denial of due process and equal protection of the laws in violation of the Fifth and Fourteenth Amendments to the Untied States Constitution. Respondents are liable to petitioner in such violations pursuant to 42 U.S.C. § 1983.

WHEREFORE, petitioner Rye Psychiatric Hospital Center, Inc., respectfully requests that this Court grant a judgment pursuant to Article 78 of the CPLR as follows:

(a) Directing respondents to discontinue the use of the "minimum utilization factor" in determining Rye's Medicaid rates for the years 1986 to July 2, 1991 and to include determination of Rye's entitlement to disproportionate share adjustment;

(b) Modifying the determination of Rye's 1986 through July 2, 1991 Medicaid rates and any payments made subsequent thereto and prior to the entry of a final judgment herein, so as to eliminate the application of the minimum utilization factor and include disproportionate share adjustments and, incidental thereto, awarding Rye damages in the amount of $1,548,801 with interest;

(c) Awarding Rye the costs and disbursements of this proceeding including its reasonable attorneys fees pursuant to CPLR § 8601 and 42 U.S.C. § 1988; and

(d) Awarding Rye such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
February 7, 1992

RYE PSYCHIATRIC HOSPITAL CENTER, INC.

By: s/ JACK C. SCHOENHOLTZ
Jack C. Schoenholtz, M.D.

STATE OF NEW YORK)
: SS:
COUNTY OF WESTCHESTER)

JACK C. SCHOENHOLTZ, M.D., being duly sworn, deposes and says:

1. I am the President of the Petitioning Corporation in the above-entitled proceeding, I have read the foregoing amended petition and it is true to my knowledge except as to matters which are therein stated to be alleged upon information and belief, and as to those matters I believe them to be true.

s/ JACK C. SCHOENHOLTZ
Jack C. Schoenholtz, M.D.

Sworn to and subscribed before
me this 7th day of February, 1992

s/ Frederick A. Nicoll
NOTARY PUBLIC